(D.Md.1979) . . ." *In re San Juan Star Co. v. Barcelo*, 662 F.2d 108 (1st Cir. 1981).

The court in *San Juan* realized what the majority in the instant case apparently does not—that the question of whether parties in a given case should be prevented from publishing information received in the course of discovery presents a complex issue and necessitates a balancing of competing interests.

The trial court's order provides: "a) That Defendant Georgia Gazette Publishing Company shall not reproduce, quote nor refer to any information obtained solely through discovery in this litigation for the purpose of any oral or written publication by or on behalf of any defendant . . . "h) Provided that, if any party wishes to publish or otherwise disseminate any information procured solely through discovery which is covered by the terms of this order, that party shall first notify the opposite party or parties to that effect in writing, setting out with particularity the specific information that party intends to disseminate. Within five days of the receipt of such notice, the opposite party may apply to this court for an order forbidding dissemination of the particular information so specified, the burden resting upon that party to show the continued necessity of such an order. The party opposing the dissemination shall submit with his application for such order a rule nisi order setting his motion for a hearing. Until such a request for an order forbidding dissemination is denied by the court, no information covered within the terms of this order shall be disseminated. If, however, the opposite party does not request an order within five days of receipt of the notice, dissemination of the information specified in the notice shall no longer be limited by this order."[1] Presumably, the trial court would undertake to balance the interests of the parties when appellants sought to publish information obtained solely through discovery.

Regrettably, the majority concludes that, regardless of the severity and certainty of the harm to occur upon publication of information obtained through discovery, a trial court is powerless to act because of the "plain language" of Code Ann. § 2-104.[2] I do not believe this conclusion is sound. Surely it is not consistent with prior decisions of this court or with existing federal authority. I respectfully dissent.

1. Paragraph "g" of the trial court's order states:

"Excepted from the provisions of this order are: (i) Use of discovered material for purposes of this litigation by parties and counsel. (ii) Use of discovered material for review by witnesses who may testify for any party provided that party has notified the opposite party at least ten days prior to the date of the intended dissemination that the person may be used as a witness. (iii) Use in compliance with any valid subpoena served upon any party."

2. It is interesting to note that, under the Civil Practice Act, a trial court is empowered to order that "discovery not be had" where it is necessary to protect a party from "annoyance, embarrassment, oppression, or undue burden." CPA § 26(c) (Code Ann. § 81A-126(c)). Under the majority opinion, however, once the trial court permits discovery, the power of the court to protect the rights of the individual is irrevocably lost.

CUNNINGHAM

v.

The STATE.

No. 37736.

Supreme Court of Georgia.

Nov. 13, 1981.

Rehearing Denied Dec. 1, 1981.

Defendant was convicted in the Superior Court, Lincoln County, Robert L. Stevens, J., of armed robbery and murder and sentenced to death, and he appealed. The Supreme Court, Jordan, C. J., held that: (1) evidence supported convictions; (2) trial

court did not abuse its discretion in denying defendant's motions for independent psychiatric evaluation or for funds for private investigator; (3) evidence supported jury's finding that aggravating circumstances justifying imposition of death sentence existed; and (4) even though death sentence for murder was not excessive or disproportionate, death sentence for armed robbery would be set aside.

Affirmed in part; reversed in part.

1. Grand Jury ⇐17
Jury ⇐117

In prosecution for armed robbery and murder, trial court did not err in overruling defendant's motion challenging grand and traverse jury array where there was no reason why challenge could not have been filed prior to defendant's indictment and where there was no evidence to show that jury commissioners were not in strict compliance with federal district court order for selection of jurors.

2. Homicide ⇐250
Robbery ⇐24.1(3)

In prosecution for murder and armed robbery, evidence that defendant went to victim's home with express intent of robbing him, that defendant concealed murder weapon on his person, that defendant hit victim in the head, robbed him, and left him to die, and that defendant was seen in general vicinity at approximate time of murder was sufficient to support conviction.

3. Criminal Law ⇐29

Where defendant was indicted and convicted for malice murder, not felony murder, simultaneous armed robbery conviction would be affirmed.

4. Criminal Law ⇐1147
Mental Health ⇐434

Grant or denial of motion for independent psychiatric evaluation lies within discretion of trial court and will not be overturned unless abuse of discretion is shown.

5. Costs ⇐302.3
Criminal Law ⇐1147

Grant or denial of motion for funds to employ investigator lies within sound discretion of trial judge and will not be overturned unless abuse of discretion is shown.

6. Costs ⇐302.3

In prosecution for murder and armed robbery, trial court did not abuse its discretion in denying defendant's motion for funds to hire investigator where case was factually simple and did not depend on large volume of evidence of technical nature.

7. Mental Health ⇐434

In prosecution for murder and armed robbery, trial court did not abuse its discretion in overruling defendant's motion for private psychiatric examination where defendant had been examined twice and found to be mentally competent both times and where defendant did not enter plea of insanity.

8. Criminal Law ⇐412.1(2)

Where, after being advised of his rights following his arrest, defendant requested that police officers see him and defendant gave statement to officers, statement was admissible at his trial.

9. Criminal Law ⇐1169.3

In prosecution for armed robbery and murder, defendant did not suffer material prejudice from introduction of his second statement where second statement was identical to first statement and first statement was properly introduced against him.

10. Criminal Law ⇐627.7(2)

In prosecution for armed robbery and murder, trial court did not err in denying defendant's *Brady* motion for copies of exculpatory statements given to investigating officers where statements which were subject of *Brady* motion were defendant's own statements and where evidence his motion sought was introduced to jury in its entirety.

11. Criminal Law ⇐665(2)

Orderly presentation of evidence is proper reason for exception to rule requiring sequestration of witnesses.

12. Criminal Law ⇐665(2)

In prosecution for murder and armed robbery, trial court did not abuse its discretion in allowing investigating officers to remain in courtroom to assist prosecution in presenting its case, despite defendant's objection.

13. Criminal Law ⇐126(2)

In prosecution for murder and armed robbery, trial court did not err by overruling defendant's motion for change of venue based on pretrial publicity where defendant was not tried until ten months after news reports were published and there was no evidence presented as to any juror prejudice toward defendant on voir dire or otherwise.

14. Homicide ⇐354

In prosecution for murder, evidence that victim was beaten and left to die by defendant, that defendant fled and attempted to hide crime, and that sole motive for crime was robbery supported finding of aggravating circumstances required for imposition of death penalty. Code, §§ 27-2534.1(b)(2, 7), 27-2537(c)(1-3).

15. Criminal Law ⇐1208(1)

Jury's returning aggravating circumstance required for imposition of death penalty in language of code section is sufficient when evidence supports such finding. Code, §§ 27-2534.1(b)(2, 7), 27-2537(c)(1-3).

16. Criminal Law ⇐824(2)

In prosecution for murder, trial court's error in failing to charge jury with definition of aggravated battery for purposes of finding aggravating circumstances justifying imposition of death sentence was not reversible absent request to charge where evidence supported finding beyond reasonable doubt that murder was committed during commission of aggravated battery. Code, §§ 26-1305, 27-2534.1(b)(2, 7).

17. Criminal Law ⇐1206(1)

Death penalty statute was not unconstitutional for failing to set out that jury may recommend life sentence even though they find existence of aggravating circumstance and for failure to provide for life sentence without parole. Code, §§ 26-1305, 27-2534.1(b)(2, 7).

18. Robbery ⇐30

Even though defendant's sentence to death for murder was not excessive or disproportionate, sentence to death for armed robbery would be set aside.

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Samuel A. Fowler, Jr., Albert H. Dallas, Thomson, for James Cunningham, Jr.

Kenneth Goolsby, Dist. Atty., Dennis Sanders, Asst. Dist. Atty., Thomson, Arthur K. Bolton, Atty. Gen., for the State.

JORDAN, Chief Justice.

James Cunningham, Jr., was indicted for burglary, armed robbery and murder. The trial court dismissed the burglary count, and he was convicted of armed robbery and murder. The jury sentenced him to death on both counts. The case is here on direct appeal and for mandatory review of the death sentences.

[1] 1. Defendant contends the trial court erred in overruling his motion to quash the indictment and his challenge to the array of traverse jurors in that both the grand and traverse jury lists were unlawfully composed.

Counsel for defendant was appointed on January 8, 1979. Defendant was not indicted until January 22, 1979. The motion to quash the indictment was not filed until October 22, 1979, one day prior to trial. No reason appearing as to why the challenge to the grand jury could not have been filed prior to indictment, there is no merit in this enumeration. The trial court did not err by failing to quash the indictments. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. den. 425 U.S. 976, 96 S.Ct. 2177, 48 L.Ed.2d 800 (1976); *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710 (1979), rev. on other

grounds, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Sullivan v. State*, 246 Ga. 426, 271 S.E.2d 823 (1980).

Furthermore, the jury commissioners of Lincoln County are presently under a continuing order of the United States District Court for the Southern District of Georgia to revise the grand and traverse jury lists by using the registered voters list in the general election and by randomly selecting every fifth name for the traverse jury and every third name on the traverse list for the grand jury. Furthermore, prior to any change in such procedures, notice must be given to the District Court.

The jury commissioner called to testify stated that the commissioners were in strict compliance with the district court order in compiling the traverse jury list. There was no evidence that the source was tainted in that there was no showing that an opportunity for discrimination existed from the source of the jury list. Given the neutral selection methods used by the jury commissioners the statistical disparity between the percentage of blacks residing in the county and the percentage on the jury lists affords no ground of relief. The trial court did not err in overruling defendant's challenge to the array. *Davis v. State*, 241 Ga. 376(1), 247 S.E.2d 45 (1978).

[2] 2. Defendant contends in enumerations of error 2, 3 and 4 that the trial court erred in overruling his motion for new trial on the general grounds.

In addition to defendant's confession, the evidence presented authorized the jury to find that the defendant, after unsuccessful attempts to borrow money, went to the victim's home with the express intent of robbing him, that he concealed the murder weapon on his person and when he had the victim at a disadvantage began to hit him in the head until he fell to the floor. He then robbed the victim, and left him to die. The murder weapon was recovered and introduced in evidence, as was the victim's wallet and defendant's blood stained clothes. Testimony placing the defendant in the general vicinity at the approximate time of the murder and testimony about bloody footprints at the scene identified as being made by defendant's shoes was introduced, as was testimony about his flight.

The evidence presented is sufficient to authorize the verdict under the current legal standard, and there is no merit in these enumerations of error. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and *Tucker v. State*, 244 Ga. 721(1), 261 S.E.2d 635 (1979).

[3] 3. Defendant contends in enumeration of error 6 that his conviction and sentence to death for armed robbery are error. He argues that the conviction must be set aside because the armed robbery is the felony supporting his felony murder conviction. Defendant was indicted for malice murder and the jury was instructed only as to malice murder. The jury returned a verdict of guilty of malice murder. *Barrow v. State*, 235 Ga. 635(2), 221 S.E.2d 416 (1975); *Dobbs v. State*, 236 Ga. 427, 433, 224 S.E.2d 3 (1976); and *Fleming v. State*, 236 Ga. 434, 435, 224 S.E.2d 15 (1976). His conviction for armed robbery must be affirmed.

4. Defendant contends in enumerations of error 8 and 9 that the trial court erred in denying his motion for funds for a private investigator and for an examination by a private psychiatrist.

[4-6] The grant or denial of a motion for independent psychiatric evaluation lies within the discretion of the trial court and will not be overturned unless an abuse of discretion is shown. *Messer v. State*, 247 Ga. 316(1), 276 S.E.2d 15 (1981). Likewise, the grant or denial of a motion for funds to employ an investigator lies within the sound discretion of the trial judge and will not be overturned unless an abuse of discretion is shown. See *Whitaker v. State*, 246 Ga. 163, 269 S.E.2d 436 (1980). The case against the defendant was factually simple and did not depend on a large volume of evidence of a technical nature. We find no abuse of discretion in the trial court's denial of the motion for funds to hire an investigator.

[7] The defendant was examined twice at Central State Hospital and found to be mentally competent both times. No plea of insanity was filed, and under the circumstances of this case we find no abuse of discretion in overruling the motion for a private psychiatric examination.

5. Defendant contends in enumeration of error 10 that the trial court erred in overruling his motion to suppress the several statements he gave to police officers. He gave four statements to officers, and each time prior to making the statement he was advised of his rights and signed a written waiver. The first and second statements are identical, one given to the North Carolina authorities at the time of his arrest, and one to the Georgia authorities. On the return trip to Georgia, the defendant spontaneously amended his statement, telling where he had disposed of the murder weapon and the clothes he was wearing on the night of the murder. Later, the defendant requested officers to come see him. He then gave a fourth statement implicating his wife in that she planned the robbery and took the money from the bedroom while he beat the victim with a wrench.

"In the course of the trial, the court conducted a Jackson-Denno hearing in which the court concluded that his confession was freely and voluntarily given. There being ample evidence presented in the trial court to support its determination, it will not be disturbed on appeal." *Gunn v. State*, 244 Ga. 51, 257 S.E.2d 538 (1979).

[8, 9] On January 2, 1979, the defendant gave North Carolina authorities a complete confession after he was advised of his rights and he signed a written waiver. Sometime thereafter an attorney was appointed for extradition purposes. Georgia authorities arrived in North Carolina, questioned him on January 3, 1979, and obtained an identical statement after a written waiver. The first statement was introduced in evidence against him as was the second. After he was returned to Georgia, local counsel was appointed. Thereafter, on the 12th of January, he got in touch with detectives, requested they come to see him, and gave a full statement which was also introduced in evidence against him. He now complains that the second and fourth statements were made without benefit of counsel and should be excluded. We do not agree. The last statement was made upon his own request, and therefore was properly admitted. *Edwards v. Arizona*, — U.S. —, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The second statement taken by Georgia authorities in North Carolina was identical to the first statement. Because the first statement was properly introduced against the defendant, no material prejudice has been demonstrated. There is no merit in this enumeration of error.

[10] 6. Defendant argues in enumeration of error 11 that the trial court erred in denying his Brady motion seeking copies of his statements given to the investigating officers. He argues that the statements contained exculpatory matters as to the murder charge.

This same argument was made in *Baker v. State*, 245 Ga. 657(3), 266 S.E.2d 477 (1980), and this court held: "Brady applies to 'the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.' *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976)." Here defendant's own statements were the subject of the Brady motion. Thus, this was not information unknown to the defense and subject to discovery under Brady. Furthermore, the evidence his motion sought was introduced to the jury in entirety, and a favorable inference, if any, could be drawn by the jury. *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980). There is no merit in this enumeration of error.

7. In the twelfth enumeration of error the defendant contends the trial court erred in allowing the two G.B.I. agents assigned to investigate the case to remain in the courtroom to assist in the prosecution over his objection. His argument is that the district attorney did not present sufficient facts to the court for it to exercise its discretion in allowing the two agents to remain and not to require the prosecution

to call them as its first witnesses. Pretermitting waiver, we find no merit in defendant's argument.

In his request to the court to allow the witnesses to remain in the courtroom, the district attorney stated that he would put the witnesses up "as quickly as I can."

Only one of the agents was called to testify although the other was sworn and offered to the defense for cross-examination. The agent who testified did not testify on the same subjects as previous witnesses.

[11, 12] It has been held many times that it is within the trial court's discretion to allow the prosecuting officer to remain in the courtroom as an exception to the sequestration rule. *Hall v. State*, 243 Ga. 207(6), 253 S.E.2d 160 (1979). The orderly presentation of evidence is a proper reason for an exception to the rule of sequestration. *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209 (1980); *McNeal v. State*, 228 Ga. 633, 187 S.E.2d 271 (1975). There is no merit in this enumeration of error. See generally *Cape v. State*, 246 Ga. 520, 272 S.E.2d 487 (1980); *High v. State*, 247 Ga. 289, 276 S.E.2d 5 (1981).

[13] 8. Defendant contends in enumeration of error 13 that the overruling of his motion for change of venue was error.

The motion was based on three news reports and the "small town syndrome" argument that everybody in town knew everything that was going on. The three news reports told of the murder, the arrest of the defendant the following day, and his indictment three weeks later. The articles were factual in nature and the defendant has failed to show a "pattern of deep and bitter prejudice" created by pre-trial publicity was "present throughout the community" and was reflected in the verdict reached by the jurors who tried him. *Irvin v. Dowd*, 366 U.S. 717, 727, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751 (1960). See *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979). The defendant was not tried until some ten months later, and no evidence was presented as to any prejudice towards the defendant on voir dire or otherwise. No prospective juror was excused for prejudice. *Messer v. State*, supra. The motion is completely lacking in merit and the trial court did not err in overruling it.

Enumerations of error 5, 7, 14 and 15, challenging the constitutionality of the death penalty and the finding of the (b)(7) aggravating circumstances will be dealt with in the sentence review.

## SENTENCE REVIEW

As required by Georgia Law (1973), p. 159, et seq., (Code Ann. § 27-2537(c)(1-3)), we have reviewed the death sentences in this case. We have considered the aggravating circumstances found by the jury and the evidence concerning the crime and the defendant. We conclude that the sentences of death in this case were not imposed under the influence of passion, prejudice, or any arbitrary factor.

[14] 9. The jury found the following aggravating circumstances: (a) the offenses of murder and armed robbery were committed while the offender was engaged in the commission of another capital felony or aggravated battery. Code Ann. § 27-2534.1(b)(2); and, (b) the offenses of murder and armed robbery were outrageously or wantonly vile, horrible, inhuman, in that they involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7).

The evidence supports the finding of both aggravating circumstances by a rational trier of fact beyond reasonable doubt. *Jackson v. Virginia*, supra. *Cervi v. State*, — Ga. —, 282 S.E.2d 629 (1981).

In that the sentences of death in this case rest partially upon a finding of Code Ann. § 27-2534.1(b)(7), they must be reviewed in light of the United States Supreme Court's decision in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398, supra, as construed by this court in *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980). "Torture," as the term is used in the statute, occurs when the victim is subjected to serious physical abuse prior to death. *Hance v.*

*State*, supra. The victim in this case was not killed instantaneously, but was beaten with a large wrench. Forensic medical evidence established that both of the victim's forearms were broken, the victim's lip was bruised, his nose was split, and his cheekbone was fractured. The victim suffered blows to the head which resulted in eight skull fractures. By the defendant's own statement, when he left, the victim was lying on the floor moaning. "Torture" also occurs when a victim is subject to an aggravated battery prior to death. The jury was authorized to find from the evidence an aggravated battery prior to death in that the victim's arms were, at a minimum, rendered useless. *Hance v. State*, supra; *Baker v. State*, supra. A defendant who "tortures" his victim may be found to have a depraved mind. *Hance v. State*, supra. This was not a domestic murder, the victim gave the defendant no reason whatsoever to assault him, and was in no manner threatening. Rather, he had befriended the defendant and given him and his family food on prior occasions. The defendant and his wife fled and attempted in every manner to hide the crime. See *Godfrey v. Georgia*, supra. The sole motive for the murder was to rob the victim. The murder was outrageously or wantonly vile, horrible and inhuman, and this murder is distinguished from ordinary murders in which the death penalty is not appropriate. *Justus v. State*, 247 Ga. 276, 276 S.E.2d 242 (1981); *Cervi v. State*, supra. Under the facts of this case, this court finds that the murder was of the type universally condemned by civilized society as wantonly vile, horrible, and inhuman as it involved torture to the victim as set forth above.

[15] 10. The appellant argues that since the jury found the aggravating circumstances set forth in division 9 above in the words of the statute, that is, a finding connected by the conjunction "or", this in itself indicates that the jury did not make up their minds that the aggravating circumstance existed beyond a reasonable doubt. However, the jury's returning the aggravating circumstance in the language of the code section is sufficient when the evidence supports such a finding. See *Hance v. State*, supra.

[16] 11. Appellant contends that the trial court erred in failing to charge the definition of aggravated battery as that the term is used in both Code Ann. § 27-2534.1(b)(2) and § 27-2534.1(b)(7). However, in this case the evidence supported a finding by a rational trier of fact beyond a reasonable doubt that the murder and armed robbery of the victim were committed while in the commission of an aggravated battery, and furthermore that the murder and armed robbery were outrageously or wantonly vile, horrible or inhuman, and that they involved an aggravated battery to the victim. Therefore, in this case, absent a request to charge, it was not reversible error for the trial court to fail to charge the definition of an aggravated battery. Code Ann. § 26-1305. *Cape v. State*, supra; see *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981).

12. The trial court did not err in failing to charge the meaning of Code Ann. § 27-2534.1(b)(7). *Hance v. State*, supra; *Cape v. State*, supra; *Gilreath v. State*, supra.

[17] 13. We find defendant's arguments that the Georgia death penalty statute is vague because it fails to set out that the jury may recommend a life sentence even though they find the existence of an aggravating circumstance and, furthermore, that the statute is unconstitutional because under our system there is no provision for a life sentence without parole, to be without merit. *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1978); see *Tucker v. State*, 244 Ga. 721(11), 261 S.E.2d 635 (1979).

[18] 14. The trial court's written charge to the jury during the sentencing phase of the trial was not subject to the defects dealt with in *Fleming v. State*, supra, and *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1978). However, the trial court, in its oral charge to the jury, did not give the entire written charge that was ultimately sent out with the jury as required

by the statute. While we do not approve of this practice, the charge as a whole met the test set forth in *Spivey v. State*, 241 Ga. 477, 246 S.E.2d 288 (1978).

In reviewing the death penalty in this case we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the appendix support affirmance of the death penalty.

This was a brutal killing of an armed-robbery victim for the sole purpose of financial gain. The 22 cases in which the death penalty was imposed support the death penalty in the instant case. All of these cases involve the deliberate, unprovoked killing of an unarmed robbery victim or victims, and thus show a jury's willingness to impose a death sentence under these circumstances.

Defendant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant. However, his sentence to death for armed robbery must be set aside and he must be resentenced as to that offense. *Floyd v. State*, 233 Ga. 280, 285, 210 S.E.2d 810 (1974); *Gregg v. State*, 233 Ga. 117, 126(6), 210 S.E.2d 659 (1974); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975).

*Judgment affirmed in part and reversed in part.*

All the Justices concur, except HILL, P. J., dissents to Divisions 1 and 14.

WELTNER, J., not participating.

## APPENDIX

*Cervi v. State*, — Ga. —, 282 S.E.2d 629 (1981); *Justus v. State*, 247 Ga. 276, 276 S.E.2d 242 (1981); *Solomon v. State*, 247 Ga. 27, 277 S.E.2d 1 (1980); *Dick v. State*, 246 Ga. 697, 273 S.E.2d 124 (1980); *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 565 (1980); *Tucker v. State*, 244 Ga. 721, 261 S.E.2d 635 (1979); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979); *Baker v. State*, 243 Ga. 710, 257 S.E.2d 192 (1979); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979); *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978); *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Dobbs v. State*, 236 Ga. 427, 234 S.E.2d 8 (1976); *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (1975); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Hunter v. State*, 231 Ga. 494, 202 S.E.2d 441 (1973); *Kramer v. State*, 230 Ga. 855, 199 S.E.2d 805 (1973); *Lingo v. State*, 226 Ga. 496, 175 S.E.2d 657 (1970).

DUNHAM

v.

BELINKY.

No. 37594.

Supreme Court of Georgia.

Nov. 13, 1981.

The Fulton Superior Court, Charles L. Weltner, J., entered judgment in divorce proceeding, and appeal was taken. The Supreme Court, Marshall, J., held that a trial court may in exercise of its discretion allow a spouse who incurs expenses in employing a private investigator in order to uncover evidence of adultery committed by the other spouse to recover those expenses as part of the alimony award.

Reversed and remanded with direction.

Clarke and Smith, JJ., dissented.

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NO. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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JAMES CUNNINGHAM, JR.,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

---

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, James Cunningham, Jr., by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the petitioner, who is presently incarcerated at the Georgia Diagnostic & Classification Center in Jackson, Georgia. Mr. Cunningham's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019

ATTORNEY FOR PETITIONER

No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

---

JAMES CUNNINGHAM, JR.,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

No.

AFFIDAVIT

---

STATE OF NEW YORK )
COUNTY OF NEW YORK) : ss:

JOHN CHARLES BOGER, being duly sworn, states:

1. I am an attorney for James Cunningham, Jr., the petitioner in the above-captioned action, and I make this affidavit in support of Mr. Cunningham's motion for leave to proceed in forma pauperis. My representation of Mr. Cunningham is without remuneration.

2. Mr. Cunningham is presently in the custody of the State of Georgia and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Cunningham by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Cunningham is attached hereto.

3. Counsel was appointed to represent Mr. Cunningham at his trial and on appeal.

4. I am informed and believe that because of his poverty, Mr. Cunningham is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Cunningham is entitled to redress in this action.

JOHN CHARLES BOGER

Sworn to before me this
29th day of January, 1982.

GLORIA A. JONES
Notary Public, State of New York
No. 24-7113000
Qualified in Kings County
Commission Expires March 30, 1982

NOTARY PUBLIC

No. 81-6151

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

---

JAMES CUNNINGHAM, JR.,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

---

I, James Cunningham, Jr., being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of Lincoln County, a trial court of the State of Georgia, of murder and armed robbery, and was sentenced to death. I am being held at the Georgia Diagnostic & Classification Center in Jackson, Georgia. I believe that errors were committed during the course

of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

James Cunningham, Jr.
JAMES CUNNINGHAM, JR.

STATE OF GEORGIA
COUNTY OF BUTTS

The foregoing affidavit of James Cunningham, Jr., was subscribed and sworn to before me this 11 day of February, 1982.

Aaron Nogueira
NOTARY PUBLIC
My Commission Expires
9-20-83